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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 824.

DAVE FASS,

Appellant,

vs.

THE STATE OF NEW JERSEY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

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Appellant herewith files his brief in opposition to the motion to dismiss his appeal.

Counter Statement of the Case.

The State's reference to Chapter 119 of the Laws of 1959 as the New Jersey Sunday Closing Law is incorrect.

The Title of Chapter 171 Title 2A of the Revised Statutes of New Jersey is "Observance of Sabbath Days." It contains 12 subsections (2A:171-1 to 2A:171-12). Chapter 119 of the Laws of 1959 is part of the 5th subsection, (2A:171-5.1 to 5.18).

In *Two Guys from Harrison* v. *Furman*, 32 N. J. 199 (1960) the New Jersey Supreme Court held (p. 225) that "Chapter 119 repealed and superseded the inconsistent

policy contained in 2A:171-1, 2 and 6 to 12.'"[1] Thus, as stated in the Jurisdictional Statement, (p. 10) New Jersey no longer has a general Sunday law.

POINT I.

The Sunday Law decisions in this Court do not affect Chapter 119 of the Laws of 1959.

This Court specifically pointed out in *McGowan* vs. *Maryland*, 366 U. S. 420 (1960) at p. 453:

> "Finally, we should make clear that this case deals only with the constitutionality of Section 521 of the Maryland statute before us. We do not hold that Sunday legislation may not be a violation of the 'Establisment' Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion."

In addition to the argument set out in the Jurisdictional Statement, it should be noted that Chapter 119 specifically states that, "This act shall be construed as an additional remedy *to secure proper Sunday observance* * * *" (italics mine)[2].

Proper Sunday observance can mean only one thing—religious observance.

This statute thus fits directly into the language above quoted from *McGowan* v. *Maryland*, *supra*. Its violation of

[1] 2A:171-1 reads as follows: No worldly employment or business, except works of necessity and charity, shall be performed or practiced by any person within this state on the Christian Sabbath or first day of the week, commonly called and hereinafter designated as Sunday.

[2] 2A:171-5.11 (p. 5 of Jurisdictional Statement).

the "Establishment" Clause is evidenced both on the face of the legislation and in its operative effect.

In view of the fact that New Jersey no longer has a general Sunday Law and, also, that the statute *sub judice* specifically provides an additional remedy to secure proper Sunday observance, it thus runs afoul the First and Fourteenth Amendments of our Constitution. The previous Sunday Law decisions in this Court are not applicable.

POINT II.

The Statute Violates the Guarantees of the "Equal Protection" Clause of the Fourteenth Amendment.

The statute does not affect all merchants—only those who sell the five prohibited categories of merchandise. Neither does it affect all merchants who sell such merchandise—only those who do business in thirteen of the twenty-one counties of the State.

In addition thereto, there is no rhyme nor reason for the classification. Merely to set out the list of articles prohibited from selling as against those permitted would show the arbitrariness of the statute. For example, a doll carriage may be sold but not a baby carriage; golf shoes may be sold but not dress shoes; supplies for an auto or a garden may be sold, but not supplies for the house; automobile radios may be sold but not house radios; yard goods may be sold but not any finished product made from these yard goods; birds may be sold but not bird cages; seat covers for an automobile may be sold but not slip covers for a sofa; wall paper paste and wall paper brushes may be sold but not wall paper; dog collars and chains may be sold but not baby diapers; ski boots, ice skates and baseball mits may be sold but not handkerchiefs; a

pair of pliers, a hammer and a wrench may be sold but not nails, screws or bolts; a gasoline can may be sold but not a laundry basket; cheesecloth may be sold but not sheets, pillow cases or towels; disposable vacuum cleaner bags may be sold but not cloth vacuum cleaner bags; paint rollers and trays may be sold but not bread boxes; flashlights and charcoal lighter may be sold but not electric light fixtures; glue may be sold but not plaster or cement, and so on *ad infinitum*.

This list clearly demonstrates how arbitrary and unreasonable is the statute *sub judice*.

Counsel for the appellee claims (page 9 of his brief) that the New Jersey Supreme Court held that the legislature may classify based upon such considerations as the amount of traffic, noise or other bustle which the sale of these commodities engender and infers that the statute was posed to curb highway selling. The fact is that this statute did not close any of the highway stores, for they still sell all the permitted articles and the traffic is just as heavy now as it was formerly.

The New Jersey Supreme Court also held that the evil to which the legislature addressed itself was the unreasonable interference with the efforts of the vast majority of the citizens to find surcease from the pressures of the work week on the day generally selected by them for that purpose. The fallacy with this is that this statute affects only a small minority of our citizens, for, as Justice Francis said in his dissenting opinion in *Two Guys from Harrison* vs. *Furman*, *supra*, page 239:

> ". . . Thus, it may be estimated that only approximately 8.9% of the New Jersey labor force are subjected to the Sunday ban. And on recalling that the referendum as to whether the 1959 act should apply in a particular county appeared on the ballot

> in only 15 of our 21 counties, and that it failed of adoption in three of them, it becomes obvious that the percentage of workers affected is even less than 8.9%. Consequently, the prescribed day of rest is provided for these relatively few workers because their employers cannot sell articles in the five categories specified."

In view of the foregoing it seems to be definitely established that the classification in the statute is arbitrary, unreasonable and violates the equal protection clause of the Fourteenth Amendment.

POINT III.

The interpretation of N. J. S. 2A:171-4 is a denial of due process.

As to this point appellant relies on his argument as stated in the jurisdictional statement.

The State, however, raises the question that the appellant never contended that he had been denied due process by virtue of his conviction. Appellant always contended that this section gives him immunity and, if the Court had adopted the construction as set forth in the dissenting opinion of Chief Justice Weintraub, the statute would not have been vague at all. However, the Court in its majority opinion put a forced construction on the words "openly exposing" and admitted in its opinion that the phrase was vague for, as it said in its opinion, 36 N. J. at p. 121:

> "If, perchance, we have misconstrued the language of section 4, or misapprehended the intention of the Legislature in retaining it, particularly in the 1937 and 1951 revisions, having in mind the sensitive

> problem involved, we trust that the lawmakers will review and rephrase it *so as to leave no doubt as to the nature of the exemption provided.*" (Emphasis mine.)

As soon as appellant became aware of the forced construction placed by the majority of the New Jersey Supreme Court, which construction rendered the exclusion vague, he applied for rehearing specifically on that ground and the rehearing was denied.

It is also to be noted that in appellant's original brief and appendix before the New Jersey Supreme Court he said on page 17:

> ". . . If, however, Section 4 does not grant the immunity claimed by this defendant, the act is unconstitutional as against him and must be struck down."

It is therefore respectfully submitted that the Appellant has been timely in raising this issue and that, this being a criminal case, it should be considered by this court.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the motion to dismiss be denied and that this Court should note probable jurisdiction as prayed for in the jurisdictional statement.

Respectfully submitted,

JOSEPH L. FREEMAN,
Attorney for Appellant